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It is this fact that precludes any definite answers without further litigation or new legislation. In the meantime, the most that can be said is that complete reliance on either *Hutcheson* or *Allen Bradley* has been renounced by the majority of the Court.

MARTIN N. ERWIN

Labor Law—Pre-Election v. Post-Election Relief Under the LMRDA

When Raymond Harvey sought to nominate himself for office in the National Marine Engineers Beneficial Association, he discovered that he was unable to do so since he was ineligible to be a candidate. The union bylaws provided that a member could nominate only himself for office, and the union's constitution provided that no one was eligible for nomination to a full-time union office unless he had been a union member for five years and had served at least 180 days in each of two of the three preceding years on ships with union contracts. Harvey had not met the service requirement.[1] He sued the union president, Jesse Calhoon, to enjoin the election, alleging violations of Title I of the Labor Management Reporting and Disclosure Act of 1959. This Title guarantees equal rights to all union members to nominate candidates[2] and allows any member whose rights are violated to bring a pre-election suit in a federal district court for a remedy.[3]

The question presented to the United States Supreme Court in *Calhoon v. Harvey*[4] was whether plaintiff Harvey's rights under

Bradley, concurring in *Pennington* and dissenting in *Jewel*. In a separate opinion, Mr. Justice Goldberg, joined by Justices Harlan and Stewart, concurred in both cases but dissented from the extra-unit bargaining rule. This separate opinion raised many of the important problems inherent in the opinion of the Court. Its basic position is that Mr. Justice White has ignored the fundamental realities of collective bargaining and established barriers to negotiation which will frustrate the congressional intent to promote labor peace and stability.

[1] Harvey v. Calhoon, 324 F.2d 486, 487 (2d Cir. 1963).

[2] (Landrum-Griffin Act) § 101(a)(1), 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(1) (1965) [hereinafter cited as LMRDA] provides:

> Equal Rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organizations, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

[3] LMRDA § 102, 73 Stat. 523 (1959), 29 U.S.C. § 412 (1965).

[4] 379 U.S. 134 (1964).

Title I had been violated or whether his rights under Title IV had been violated. Title IV provides that every union member in good standing is eligible "to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed) . . . ,"[5] and allows only a post-election remedy by way of petition to the Secretary of Labor who may direct a new election.[6]

The district court had dismissed the complaint, holding that it did not have jurisdiction since a Title I violation was not alleged.[7] The Second Circuit reversed, holding that the allegations did indicate a Title I violation.[8] The Supreme Court reversed the Second Circuit, accepting the contention of defendant Calhoon that the district court was correct in refusing to hear the case.

The Court refused to consider Title IV violations when determining if Title I had been violated, but discussed the provisions of Title IV in clarifying its decision to deny relief under Title I.[9] In concurring, Mr. Justice Stewart accepted the possibility that a Title IV violation might also violate Title I, rejecting the majority's refusal to consider this.[10] Mr. Justice Douglas dissented,[11] adopting the opinion of the Second Circuit that the restrictions in this case were a violation of Title I.

Section 101(a)(1), part of labor's "bill of rights,"[12] guarantees union members equal rights and privileges to nominate candidates for union office subject to reasonable rules in the union's constitution and bylaws.[13] Section 102 allows any person whose rights secured under Title I have been infringed to bring an action for appropriate civil relief (including injunctions) in a United States district court.[14] This remedy, unlike that provided in Title IV,[15] is

[5] LMRDA § 401(e), 73 Stat. 532 (1959), 29 U.S.C. § 481(e) (1965).
[6] LMRDA § 402(a), 73 Stat. 532 (1959), 29 U.S.C. § 482(a) (1965).
[7] Harvey v. Calhoon, 221 F. Supp. 545 (S.D.N.Y. 1963).
[8] 324 F.2d 486 (2d Cir. 1963).
[9] 379 U.S. at 139-40.
[10] *Id.* at 143.
[11] *Id.* at 141.
[12] This provision was an amendment to the original Kennedy-Ervin bill. 105 CONG. REC. 6475 (1959). Proposed by Senator McClellan, it was amended by Senator Kuchel to provide the right of union members to sue in federal courts. 105 CONG. REC. 6719-20 (1959). (Senator McClellan's amendment had provided for enforcement by the Secretary of Labor.) For a discussion of the legislative history of the act, including Title I, see McADAMS, POWER AND POLITICS IN LABOR LEGISLATION (1964).
[13] 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(1) (1965).
[14] 73 Stat. 523 (1959), 29 U.S.C. § 412 (1965).
[15] LMRDA § 403, 73 Stat. 532 (1959), 29 U.S.C. § 483 (1965).

not exclusive. Section 103 specifically preserves existing rights under state and federal law.[16]

An examination of Title IV clarifies the distinction between a right to nominate and a right to be a candidate. Section 401(e) provides that a union member's right to candidacy is "subject to . . . reasonable qualifications uniformly imposed."[17] Relief for violations of this right is provided by appeal to the Secretary of Labor. Exhaustion of internal union remedies or pursuit of these remedies without a final decision within three months is a prerequisite to this relief. Once this exhaustion requirement is met, the complaining union member may petition the Secretary, who must determine if the restrictions on candidacy are not "reasonable" or not "uniformly imposed."[18] If he so finds, he may sue to have the election invalidated. In section 403 this procedure is declared to be exclusive.[19]

An effective distinction has been drawn between offenses that violate Title I, thus justifying pre-election relief, and offenses that violate Title IV, justifying only post-election relief. The Senate debate on Title I indicated this:

> Mr. KUCHEL. I do not believe that in any fashion the equal rights section touches what the provisions of the [union's] constitution or bylaws might be with respect to the right to run for office.
>
> In that connection, I should like to ask the author of the bill [Mr. Kennedy] . . . if he can shed any light on what may be in the bill with respect to that problem.
>
> . . .
>
> Mr. KENNEDY. [T]he bill of rights must be read in conjunction with the remainder of the bill. [In Title IV] we find the following language: (d) In any election . . . every member in good standing shall be eligible to be a candidate and to hold

[16] 73 Stat. 523 (1959), 29 U.S.C. § 413 (1965).
[17] 73 Stat. 532 (1959), 29 U.S.C. § 481(e) (1965).
[18] 73 Stat. 532 (1959), 29 U.S.C. § 482(a) (1965).
[19] One court has recognized this exclusiveness by way of dictum:
> Title IV of the LMRDA creates the right of candidacy and simultaneously vests but limited jurisdiction to grant redress for its violation. The more general provisions of 28 U.S.C.A. § . . . 1337 [granting federal jurisdiction in civil actions under acts of Congress that regulate commerce or protect trade] cannot expand the restricted scope of jurisdiction conferred by the LMRDA.

Colpo v. Highway Truck Drivers Union, 201 F. Supp. 307, 314 (D. Del. 1961), *vacated,* 305 F.2d 362 (3d Cir. 1962).

> office (subject to reasonable qualifications uniformly imposed)....
>
> So other rights are guaranteed, *in addition to* the rights guaranteed in the bill of rights, and the general constitutional rights.[20]

The court accepted this distinction and held that plaintiffs had not established a claim for relief, characterizing their complaint as

> an attempt to sweep into the ambit of their right to sue in federal court if they are denied an equal opportunity to nominate candidates under § 101(a)(1), a right to sue of they are not allowed to nominate anyone they choose regardless of his eligibility and qualifications under union restrictions.[21]

Error was found in the decision of the Second Circuit, which had considered the "*combined* effect of the eligibility requirements and the restriction to self-nomination."[22]

By adopting this interpretation of Title I, the Court supported a general congressional policy against intervention in union affairs and refused to encroach upon the authority given the Secretary of Labor by Title IV. Mr. Justice Black said:

> Congress . . . decided not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV. Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies. . . .[23]

The Secretary has discretion not to sue to invalidate every election in which a complaint is filed. The act, by allowing him to investigate complaints for up to sixty days,[24] has discouraged litigation. The Secretary may discover that no violation was committed, or, as has happened when the violation was clear, the union may act to remedy it.[25] The investigation is conducted by the Office of

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[20] 105 CONG. REC. 6720 (1959). (Emphasis added.)
[21] 379 U.S. at 138.
[22] *Id.* at 139.
[23] *Id.* at 140.
[24] LMRDA § 402(b), 73 Stat. 534 (1959), 29 U.S.C. § 482(b) (1965).
[25] Two recent examples illustrate this. On December 29, 1964, the executive board of the International Electrical Workers declared that incumbent president James B. Carey, Jr., had defeated challenger Paul Jennings by about 2,000 votes. Jennings appealed the election, and the Secretary of Labor ordered an investigation that revealed irregularities in the tabulation of votes. No suit was ever brought since the union immediately declared Jennings the victor. Facts on File, April 1-7, 1965, p. 1275. In the most recent United Steelworkers presidential election, challenger I. W. Abel de-

Labor-Management and Welfare-Pension Reports under authority delegated by the Secretary.[26] Suit is brought only if the investigation shows that the violations may have affected the outcome of the election.[27]

If suit is brought, the role of the court is narrow. Section 402(c) of the act limits a court's determination to whether an election was held within the prescribed time or whether a Title IV violation may have affected the outcome.[28] If a new election is ordered, the Secretary of Labor must supervise it, in conformity with union constitution and bylaws, and certify the results.[29]

Title IV, which leaves most internal matters in the hands of the union and does not subject the union to civil liability, did not disturb organized labor as much as the "bill of rights," which was opposed from its inception.[30] In a House committee hearing, George Meany, president of the AFL-CIO, called Title I

> a device by means of which union officials or unions themselves as entities can be haled before . . . the Federal courts and compelled to account for the manner in which its internal affairs are being conducted.
>
> A basic difficulty, as we see it, is that any effort to write a detailed, legally enforcible code of internal procedures for all unions into a Federal law must inevitably end up either in such

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feated incumbent David J. McDonald by about 10,000 votes. Here the Secretary was never called upon. Union tellers investigated 153 complaints, two thirds of which had been filed by Abel forces. McDonald was unable to cite a single solid case of fraud or illegal voting procedures, and the investigators found none. Thus McDonald had no ground on which to appeal the election. The union had handled its own affairs; litigation was unnecessary. Business Week, May 1, 1965, pp. 49-50.

[26] Riche, *Union Election Challenges Under the LMRDA*, 88 MONTHLY LABOR REVIEW 1 (1965).

[27] If the Secretary finds no indication that the outcome of an election had been affected, he is not required to bring suit. Altman v. Wirtz, 56 L.R.R.M. 2651 (D.D.C. 1964). This is analogous to the power given to the General Counsel by the Taft-Hartley Act. Refusal of the General Counsel to issue a complaint "is final and unappealable." Wellington Mill Div., West Point Mfg. Co. v. NLRB, 330 F.2d 579, 590 (4th Cir. 1964).

[28] 73 Stat. 534 (1959), 29 U.S.C. § 482(c) (1965).

[29] *Ibid.* See United Steel Workers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960), in which Mr. Justice Douglas said (concerning a collective bargaining dispute): "The ablest judge cannot be expected to bring the same experience and competence [as the labor arbitrator] to bear upon the determination of a grievance, because he cannot be similarly informed." *Id.* at 582. See also Summers, *Judicial Settlement of Internal Union Disputes*, 7 BUFFALO L. REV. 405 (1958); Strauss & Willner, *Government Regulation of Local Union Democracy*, 4 LAB. L.J. 519 (1953).

[30] MCADAMS, *op. cit. supra* note 12, at 113-41.

> general terms as to be susceptible of almost any interpretation, and hence a breeding ground for litigation, or as a strait-jacket which would inhibit obviously reasonable and proper union practices.[31]

But the "bill of rights" remained, and judicial action has now alleviated many of the fears of organized labor.

The policy of Congress toward labor is implicit in a provision of Title I that deters union members from bringing suit, relying instead upon union procedures. Section 101(a)(4) provides that before a union member may sue for a violation of Title I, he "may be required to exhaust reasonable hearing procedures within the union (but not to exceed a four month [as opposed to three months under Title IV] lapse of time.)"[32] When suits were filed before the member had pursued his union remedies for four months, the courts had to decide if fulfilment of this procedural requirement was (1) necessary to jurisdiction, (2) unnecessary to jurisdiction, or (3) necessary, but waivable in certain circumstances.

An explanation by Senator Kennedy indicated that fulfilment of this requirement was unnecessary to jurisdiction insofar as the courts were concerned. He did, however, deem the requirement to be applicable to union members,[33] so that a union could discipline a member for breach of the restriction though it could not prevent him from bringing suit.[34] In *Detroy v. American Guild of Variety*

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[31] *Hearings Before Joint Subcommittee on Labor-Management Reform Legislation of the House Committee on Education and Labor,* 86th Cong., 1st Sess., pt. 4, at 1515 (1959). Meany also said: "Every Chairman of a local union meeting will be acting under shadow of a court suit each time he makes a ruling on conduct of the meeting." 105 CONG. REC. (Daily Appendix) 6402 (1959).

[32] LMRDA § 101(a)(4), 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(4) (1965). The four-month period is apparently measured from the time the appeal is initiated, rather than from the time of the violation, though no court has clearly stated this. See McCraw v. United Ass'n of Journeymen, 341 F.2d 705, 711 (6th Cir. 1965). For a discussion of the exhaustion requirement see O'Donoghue, *Protection of a Union Member's Right to Sue Under the Landrum-Griffin Act,* 14 CATHOLIC U.L. REV. 215 (1965).

[33] Nor is the intent or purpose of the provision to invalidate the . . . decisions of many years standing which require, or do not require, the exhaustion of internal remedies prior to court intervention.

. . .

For example, the National Labor Relations Board is not prohibited from entertaining charges by a member against a labor organization even though 4 months has not elapsed.

105 CONG. REC. 17899 (1959).

[34] See McCraw v. United Ass'n of Journeymen, 341 F.2d 705, 711 (6th Cir. 1965).

Artists[35] the Second Circuit concluded that fulfilment of the exhaustion requirement was necessary but waivable since the statute used the word *may* instead of *must*. In this case the Second Circuit waived the requirement because here the union remedy was uncertain and had not been brought to the plaintiff's attention, the violation was clear and undisputed, and the injury was immediate and not compensable by damages.[36] Other courts have followed this result, developing a doctrine of futility by accepting cases if the union appeal procedures would be utterly useless or unduly complicated.[37]

The courts will apparently apply the same rationale when considering the exhaustion requirement of Title IV. Under Title IV a union member may petition the Secretary for relief after invoking internal union remedies for three months. In practice the Secretary has accepted cases in which remedies had not been pursued for the statutory period.[38] One district court has indicated that it would accept a case brought prematurely when appeal within the union would be futile.[39]

The specific requirement for exhaustion of remedies and the

[35] 286 F.2d 75 (2d Cir. 1961).

[36] *Id.* at 81.

[37] McCraw v. United Ass'n of Journeymen, 341 F.2d 705, 711 (6th Cir. 1965) (case heard since time elapsed); Farowitz v. Associated Musicians, 330 F.2d 999, 1002 (2d Cir. 1964) (no appeal was necessary when it "would be a futility"); Harris v. International Longshoremen's Ass'n, 321 F.2d 801, 805 (3d Cir. 1963) (hearing denied until internal appeal attempted); Burris v. International Bhd. of Teamsters, 224 F. Supp. 277 (W.D.N.C. 1963). In the latter case, the court accepted jurisdiction since appeal was impractical because the discharged union member would have to protest his discharge and be reinstated before he could begin his appeal. *Id.* at 280. A federal district court in California has required exhaustion even if futile. Smith v. General Truck Drivers Union, 181 F. Supp. 14 (S.D. Cal. 1960). The court cited a California state court decision requiring exhaustion unless it could be held as a matter of law that such procedure would be to no avail. *Id.* at 18. A more liberal view has now been taken by the Second Circuit. In Libutti v. Di Brizzi, 337 F.2d 216 (2d Cir. 1964), it held: "Where . . . conceded facts show a serious violation of a fundamental right, we hold that plaintiffs need not exhaust their union remedies." *Id.* at 219. (Observe that *Calhoon* reversed this court's interpretation of section 101(a)(1) of the LMRDA.)

[38] Wirtz v. Local 125, Int'l Hod Carriers, 231 F. Supp. 590 (N.D. Ohio 1964).

[39] *Id.* at 595. The court approved the "futility" doctrine as stated in Calagaz v. Calhoon, 309 F.2d 248, 260 (5th Cir. 1962) (appeal unnecessary when persons it was directed against were to hear it, but refused to hear the Secretary's complaint since it appeared that appeal was not futile). (The Secretary contended that the exhaustion requirement did not bind the court; he did not argue that appeal was futile.)

reliance on the Secretary of Labor support the congressional policy of allowing unions the greatest possible latitude in handling their internal affairs. Before the ruling in *Calhoon,* several district courts had heard cases alleging Title I violations and had given effect to this policy, denying pre-election relief and holding that a Title IV, not a Title I, violation was alleged.[40]

Calhoon represents a functional interpretation of the act. It achieves a delicate balance between union freedom and individual justice. The Court understood that Congress did not intend restrictions concerning candidacy, whether "reasonable" or unreasonable, to constitute a Title I violation. Both the legislative history and the policy implicit in the other provisions of the act justify this conclusion. The act seeks to prevent union abuse in its internal procedures, not to establish a means of ignoring those procedures. The Supreme Court, though denying plaintiffs an immediate remedy, has upheld the congressional policy of relying upon union procedures as long as they effectively protect the rights of union members guaranteed in the act.

GEORGE CARSON II

Practice and Procedure—Res Judicata in Parent's Suit for Medical Expenses and Loss of Services

The recent North Carolina decision of *Kleibor v. Rogers*[1] restates the majority rule that, following an injury to his minor child, a father is not barred from bringing an action for medical expenses and loss of services and earnings of the infant when the infant has failed on the merits in a prior suit based on the same occurrence.[2]

[40] Jackson v. National Marine Eng'r Beneficial Ass'n, 221 F. Supp. 347 (S.D.N.Y. 1963); Jackson v. International Longshoremen's Ass'n, 212 F. Supp. 79 (E.D. La. 1962); Colpo v. Highway Truck Drivers, 201 F. Supp. 307 (D. Del. 1961); Johnson v. San Diego Waiters Union, 190 F. Supp. 444 (S.D. Cal. 1961).

[1] 265 N.C. 304, 144 S.E.2d 27 (1965). The case arises out of an injury to plaintiff's nine-year-old son. Judgment for the defendant in a prior action by the mother as next friend was held not to be res judicata in the father's action.

[2] See cases collected in Annot., 133 A.L.R. 181, 201-02 (1941). For other North Carolina cases see, *e.g.,* Ellington v. Bradford, 242 N.C. 159, 86 S.E.2d 925 (1955); Rabil v. Farris, 213 N.C. 414, 196 S.E. 321 (1938); Thigpen v. Kinston Cotton Mills, 151 N.C. 97, 65 S.E. 750 (1909). The rule was criticized and the application of res judicata in these cases was urged in *North Carolina Case Law—Judgments,* 36 N.C.L. REV. 461, 462 (1958).